# Lyn Country Sdn Bhd v EIC Clothing Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — PETITION NO D5-28-290-1995 & D4-26-29-1995
KAMALANATHAN RATNAM JC
15 JUNE 1996

***Companies and Corporations*** *— Winding-up — Petition under s 181 — Whether procedure adopted by petitioner suggested a winding-up petition governed the Companies (Winding Up) Rules 1972 — Whether r 26 of the Companies (Winding Up) Rules 1972 must be complied with — Whether s 181 petition is governed by O 88 of the Rules of the High Court 1980 — Companies (Winding Up) Rules 1972 r 26 — Rules of the High Court 1980 O 88*

***Companies and Corporations*** *— Winding up — Petition under s 218 of the Companies Act 1965 — Applicability of the Rules of the High Court 1980 to a s 218 petition — Whether court has jurisdiction to strike out s 218 petition — Companies Act 1965 s 218*

***Civil Procedure*** *— Action — Multiplicity of actions — Whether petitions under ss 218 and 181 of Companies Act 1965 may give rise to abuse of the process of the court*

The petitioner filed two petitions against the same repondents under ss 181 and 218 of the Companies Act respectively ('the s 181 and s 218 petitions respectively'). The respondents filed a summons in chambers to strike out the s 181 petition and a notice of motion to strike out the s 218 petition. The respondents raised several preliminary objections to the s 181 petition. The respondent contended that by the petitioner's conduct, the latter had elected to treat the petition as a petition under the Companies (Winding-Up) Rules ('the 1972 Rules') and as such, r 26 of the 1972 Rules had not been complied with. This is because r 26 of the 1972 Rules states that the affidavit verying the petition shall be served after and filed within four days after the petition is presented whereas the affidavit verifying the petition was affirmed on 8 September 1995 and the petition itself was filed only on 16 September 1995. This was in contravention of r 26. It was submitted that the petition therefore must be dismissed in limine. The respondents also contended that even if the court found that the petition was a s 181 petition, it should be struck out as the petition did not comply with O 88 of the Rules of the High Court 1980 ('the RHC 1980') as it was filed as a normal winding-up petition instead of as an originating summons. In relation to the s 218 petition the respondent submitted that this amounted to multiplicity of actions which was an abuse of the process of the court. The petitioner on the other hand, raised a preliminary objection against the notice of motion to strike out the s 218 petition. The petitioner contended that the court had no jurisdiction to grant the reliefs prayed for in the motion as the reliefs prayed were pursuant to the RHC 1980 which did not apply to a s 218 petition. Among the issues for consideration were: (i) whether the petition was a s 181 petition; (ii) whether such

petition should comply with r 26 of the 1972 Rules; (iii) whether the s 181 petition should comply with O 88 of the RHC 1980; (iv) the applicability of the RHC 1980 to a s 218 petition; (v) whether the court can strike out a s 218 petition pursuant to its inherent jurisdiction to prevent an abuse of the process of the court; and (vi) whether there was multiplicity of actions.

**Held**, dismissing the respondent's applications:

(1) Although r 26 of the 1972 Rules was not complied with, such non-compliance did not render the s 181 petition a nullity. The petitioner ought to be allowed time to re-affirm, re-file and re-serve the affidavit if such an affidavit was required. However since the petition was a s 181 petition, there was no necessity in the first place to file an affidavit to verify the s 181 petition (see p 206G); *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201 and *Sam Hin Timber Co v Perusahaan Loan Sri Duyong Sdn Bhd* followed.

(2) It is abundantly clear that the 1972 Rules have no place in a s 181 petition. A petition under s 181 ought to be governed by O 88 of the RHC 1980 and the use of the form of the petition in the 1972 Rules does not invalidate the s 181 petition, neither does it mean that by its use, the petitioner had elected to be governed by the 1972 Rules and to turn the s 181 petition into a winding-up petition (see p 208I–209A).

(3) The RHC 1980 does not apply to a s 218 petition (see p 211C).

(4) Since the RHC 1980 has no place in a s 218 petition, the court is unable to rely on O 92 r 4 of the RHC 1980 for inherent jurisdiction to strike out a s 218 petition. However s 221(2) of the Act provides for such right which the court may exercise if there are sufficient grounds to do so (see p 215A).

(5) The basis of multiplicity of actions for the motion is devoid of merit since the issues were all different and they were between either of the respondents in the hearing of the petition (see p 219C).

(6) The petitioner therefore has every right to present the petitions separately under ss 181 and 218 of the Act respectively and the respondent have failed to establish a clear cut case to warrant a striking off of those petitions (see p 220D) *Ebrahimi v Westbourne Galleries Ltd* [1973] 3 AC 360 and *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 followed.

**[Bahasa Malaysia summary**

Pempetisyen telah memfailkan dua petisyen terhadap penentang di bawah ss 181 dan 218 ('petisyen s 181 dan 218 masing-masing'). Akta Syarikat 1965 ("Akta tersebut'). Penentang telah memfailkan suatu saman dalam kamar untuk membatalkan petisyen s 181 tersebut

dan notis usul untuk membatalkan petisyen s 218 tersebut. Penentang telah membangkitkan beberapa bantahan awal terhadap petisyen s 181 tersebut. Penentang telah berhujah bahawa berdasarkan tindakan pempetisyen, pempetisyen telah memilih untuk menganggap petisyen tersebut sebagai suatu petisyen di bawah Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah 1972') dan oleh yang demikian k 26 Kaedah-Kaedah 1972 telah tidak dipatuhi. Ini adalah kerana k 26 menyatakan bahawa afidavit yang mengesahkan petisyen mesti diserahkan setelah dan difailkan dalam tempoh masa empat hari setelah petisyen tersebut dikemukakan. Dalam kes ini afidavit yang mengesahkan petisyen s 181 telah diikrarkan pada 8 September 1995 padahal petisyen tersebut telah difailkan hanya pada 11 September 1995. Telah dihujahkan bahawa petisyen tersebut harus ditolak. Penentang juga telah berhujah bahawa jikalaupun mahkamah berpendapat bahawa petisyen tersebut adalah suatu petisyen s 181, ianya harus ditolak keranan petisyen tersebut tidak mematuhi peruntukan A 88 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') oleh kerana ianya telah difailkan sebagai petisyen penggulungan biasa dan bukannya sebagai suatu saman pemula. Berkenaan dengan petisyen s 218, penentang telah berhujah bahawa ini berjumlah kepada tindakan pelbagai dan ini adalah suatu penyalahgunaan proses mahkamah. Pempetisyen pula telah membangkitkan bantahan awal terhadap notis usul pemula penentang untuk membatalkan petisyen s 218. Pempetisyen menyatakan bahawa mahkamah tidak mempunyai bidang kuasa untuk memberikan relif seperti yang dipohon dalam usul tersebut kerana relif yang dipohon adalah menurut KMT 1980 yang tidak boleh digunakan terhadap petisyen s 218. Maka isu-isu di hadapan mahkamah adalah (i) sama ada petisyen tersebut adalah suatu petisyen s 181; (ii) sama ada petisyen tersebut harus mematuhi peruntukan k 26 Kaedah-Kaedah 1972; (iii) sama ada petisyen s 181 harus mematuhi A 88 KMT 1980; (iv) pemakaian KMT 1980 kepada petisyen s 218; (v) sama ada mahkamah boleh membatalkan petisyen s 218 berdasarkan bidang kuasa sedia ada untuk mencegah penyalahgunaan proses mahkamah; dan (vi) sama ada terdapat pelbagai tindakan.

**Diputuskan**, menolak permohonan tersebut:

(1) Walaupun k 26 Kaedah-Kaedah 1972 telah tidak dipatuhi, ia tidak menyebabkan petisyen s 181 sebagai tidak sah. Pempetisyen sepatutnya dibenarkan masa untuk mengikrarkan, memfailkan dan menyerahkan semula affidavit jika affidavit sedemikian diperlukan. Walau bagaimanapun, oleh kerana petisyen tersebut adalah petisyen s 181, maka adalah tidak perlu memfailkan satu affidavit yang mengesahkan petisyen s 181 tersebut (lihat ms 206G) *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201 dan *Sam Hin Timber Co v Perusahaan Loan Sri Duyong Sdn Bhd* diikut.

(2) Adalah amat terang bahawa Kaedah-Kaedah 1972 tiada tempat di dalam petisyen s 181. Petisyen s 181 seharusnya dikuasai oleh A 88 KMT 1980 dan pemakaian bentuk petisyen Kaedah-Kaedah 1972 tidak membatalkan petisyen 181, ataupun bermakna pempetisyen memilih untuk dikuasai oleh Kaedah-Kaedah 1972 dan menjadikan petisyen s 181 sebagai petisyen penggulungan (lihat ms 208I–209A).

(3) KMT 1980 tidak terpakai kepada petisyen s 218 (lihat ms 211C).

(4) Oleh kerana KMT 1980 tiada tempat di dalam petisyen 218, maka mahkamah tidak dapat menggunakan bidang kuasa yang sedia ada di bawah A 92 k 4 KMT 1980 untuk membatalkan petisyen s 218. Walau bagaimanapun, s 221(2) Akta tersebut menyediakan hak tersebut (lihat ms 215A).

(5) Asas usul bagi tindakan pelbagai tidak mempunyai merit kerana kesemua isu tersebut adalah berlainan serta ianya hanya membabitkan salah satu daripada penentang-penentang di dalam perbicaraan petisyen tersebut (lihat ms 219C).

(6) Oleh yang demikian pempetisyen mempunyai hak untuk membentangkan petisyen-petisyen tersebut secara berasingan di bawah ss 181 dan 218 Akta tersebut masing-masing dan pihak penentang telah gagal untuk menunjukkan suatu kes yang jelas yang membolehkan petisyen-petisyen tersebut dibatalkan (lihat ms 220D) *Ebrahimi v Westbourne Galleries Ltd* [1973] 3 AC 360 dan *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 diikut.]

[*Editorial Note*: The respondents appealed to the Court of Appeal vide Civil Appeal Nos W–02–91–96 and W–02–92–96. The said appeal was heard on 9 and 10 December 1996 by Gopal Sri Ram, NH Chan and Abu Mansor JJCA. The appeal was dismissed with costs.]

**Notes**

For cases on winding-up petitions see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 511–537.

For cases on multiplicity of actions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 92–93.

**Cases referred to**

*Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 (not folld)

*Dato' Mohamed Hashim Shamsuddin v A-G of Hong Kong* [1986] 2 MLJ 112 (distd)

*Display Multiples Ltd, Re* [1967] 1 WLR 571 (refd)

*Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 (folld)

*Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290 (folld)

*Lesco Development Corp Sdn Bhd v Malaysia Building Society Ltd* [1988] 2 MLJ 184 (refd)
*Lim Tok Chiow & Anor v Dian Tong Credit & Development Sdn Bhd* [1994] 2 MLJ 345 (not follD)
*NKM Development Sdn Bhd v Irex Sdn Bhd* [1988] 1 CLJ 65 (refd)
*Perusahaan Petanda Bintang Sdn Bhd v Asbir, Hira Singh & Co* [1995] 3 CLJ 234 (refd)
*Lee Mah Realty Sdn Bhd, Re, Song Kueng Poh v Liew Chock Song & Ors* [1980] 1 MLJ 115 (refd)
*Lo Siong Fong, Re* [1994] 2 MLJ 72 (refd)
*Sam Hin Timber Co v Perumahan Loan Sri Duyong Sdn Bhd* [1983] 2 CLJ 269 (follD)
*Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201 (follD)
*Thames Lauches Ltd v Trinity House Corp (Deptford Strond)* [1961] 1 Ch 197 (refd)
*Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, intervener)* [1993] 1 MLJ 149 (refd)
*Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 40 (refd)

**Legislation referred to**

Companies Act 1965 ss 181, 213, 218, 221, 372
Companies (Winding Up) Rules 1972 rr 7(1), 8, 17, 18, 20, 26, 163, 164, 165, 193,194
Companies (Winding Up) Rules 1949 [UK] r 227
Companies (Winding Up) Rules 1946 [UK] r 210Courts of Judicature Act 1964 ss 17, 25(2)
Federal Constitution art 12 l

Rules of the Supreme Court 1957 [UK] Third Schedule
Rules of the High Court 1980 O 1, O 9, O 18, O 41, O 42, O 52, O 54, O 88, O 92

*Cecil Abraham* (*Gurmeet Kaur* with him) (*Shearn Delamore & Co*) for the petitioner.
*Mohd Ismail bin Mohd Shariff* (*K Thavakumar* with him) (*Mohamed Ismail & Co*) for the respondents.

*Cur Adv Vult*

**Kamalanathan Ratnam JC:** On 9 September 1995, the petitioner presented a 'winding-up' petition against the respondents pursuant to s 218(1)(f) and/or s 218(1)(i) ('the s 218 petition') of the Companies Act 1965 ('the Act') and for the appointment of liquidators of the first respondent under winding-up petition D5–28–290–95 and on 11 September 1995 the petitioner presented an originating petition ('the s 181 petition') in D4–26–29–95 pursuant to s 181 of the Act.

A The respondents countered by a notice of motion to strike out the s 218 petition ('the motion') and a summons in chambers to strike out the s 181 petition (hereinafter referred to as 'the application').

BACKGROUND FACTS OF THE COMPANIES

B The directors and shareholders of the petitioner are one Patricia Liew Yam Ngoon ('PL') and one Yong Siok Cheng ('YSC'). The first respondent was initially incorporated as Laguria Sdn Bhd as a private company limited by shares. Its name was subsequently changed to EIC Clothing Sdn Bhd ('EIC') on 22 November 1991. The second respondent is a wholly owned subsidiary of Metrojaya Bhd ('MJB'). Its directors are one Ng Kwan C Cheong ('NKC'), one Dato' Ismail bin Mohamad ('IM') and one Mohd Ibrahim bin Mohd Zain ('MI').

The petitioner and the second respondent are the sole shareholders of the first respondent. The petitioner holds 30% amounting to 90,000 shares and the second respondent holds 70% amounting to 210,000 D shares, in the first respondent.

BACKGROUND FACTS OF THE DRAMATIS PERSONNAE

PL was formerly an employee of MJB and the creator of East India Company Trademarks. Some time in 1990, PL expressed her desire to E leave MJB and to start her own business in the fashion industry. MJB, in recognition of her talent in the fashion industry and wishing to retain her services made a proposal for a joint venture between MJB and PL whereby MJB would provide the financial, management and administrative framework and whereby PL would contribute her designing talents and F knowhow of the fashion industry.

MJB then issued an offer letter dated 7 March 1991 to PL ('the offer letter') setting out the joint venture framework which envisaged a company in which the ownership of the trademarks created by PL would vest and in which both MJB and PL and/or her nominee company would have equal ownership and also a marketing and/or distribution network for the goods G bearing the said trademarks in which again, both MJB and PL and/or her nominee company would be the sole owners but in which MJB would retain a majority share.

PL agreed and chose to participate through her nominee company, that is the petitioner herein whilst MJB chose to participate through the H second respondent.

Subsequently the terms of the offer letter were formalized by way of a written agreement ('the agreement') dated 21 December 1992 and which was agreed to be effective as of 1 April 1991.

For the purposes of this hearing to strike out I shall not go further I into the details of the terms of the agreement. I shall refer to one of the terms which forms the basis of the petitioner's complaint. It was a term of the agreement that the petitioner would have the option at any time after the expiration of three years from 1 April 1991 to request the second respondent to purchase its entire shareholding in the first respondent and

that upon the service of a notice to exercise this option, the second respondent would become bound to purchase the petitioner's equity in the first respondent at a price to be agreed between the parties and in default of any agreement to purchase the same at a fair value within 14 days of the service of the notice and the meaning of 'fair value' was also defined. A

The petitioner then appointed PL and one Kong Mun Kwong ('KMK') as its directors to the board of directors of the first respondent. B

The petitioner contends that even the put option which would have effectively allowed the petitioner to withdraw from the first respondent had not been complied with and consequently the joint venture was at an end and as such the second respondent was running the affairs of the first respondent in a manner which secured its own interest and hence the just and equitable principle applied to wind it up. The petitioner also alluded to several unfair accounting practices adopted by the second respondent which directly favoured MJB. It is also alleged that the second respondent had refused to consent to the petitioner's request in compliance with the terms of the agreement in allowing the petitioner to be bought out at a fair value. C D

PL resigned as a director as of 1 November 1994 and in compliance with the terms of the agreement, submitted the name of another person to act as director but the name was objected to by the second respondent at the board meeting. The petitioner cited numerous other grounds to back up the said petition. By consent, the parties agreed that I hear both the application and the motion together on 14 November 1995. E

RESPONDENTS' PRELIMINARY OBJECTION

*Breach of r 26 of the Companies (Winding-Up) Rules 1972* F

At the outset, En Mohd Ismail for the respondents indicated that he was raising preliminary objections in respect of the s 181 petition. It was his submission that by the course of conduct taken by the petitioner, the petitioner had elected to treat the said petition as a petition under the Companies (Winding-Up) Rules 1972 ('the 1972 Rules'). This he contended, was his basis for objecting under r 26 of the 1972 Rules. He contended that the affidavit of PL affirmed on 8 September 1995 entitled 'affidavit verifying the petition' did not comply with r 26 of the 1972 Rules which reads as follows: G

> 26 Every petition for the winding-up of a company by the court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and *shall be sworn after and filed within four days after the petition is presented*, and the affidavit shall be prima facie evidence of the statements in the petition. (Emphasis added.) H I

As the said affidavit was affirmed on 8 September 1995, and exhibited together with a petition that was filed on 11 September 1995, it was the respondents' contention that the said affidavit was void and should be

A disregarded by the court. As a result thereof, as there was no affidavit verifying the petition, the petition must, of necessity be dismissed in limine. It was further submitted that each of the exhibits annexed to the petition shows that the commissioner for oaths had attested the same on 8 September 1995. The said affidavit was filed on 18 September 1995, well after the four-day period stated in r 26 above.

B

I was referred to *Lim Tok Chiow & Anor v Dian Tong Credit & Development Sdn Bhd* [1994] 2 MLJ 345 where Abdul Kadir Sulaiman J said at p 352:

> Now, having considered the various authorities cited, for and against, with all
> C respect due, I am inclined to agree with view cited by my two learned brothers in *Sobri*'s case [1991] 3 MLJ 32 and *Chin Yoon*'s case [1978] 2 MLJ 173 in that whatever view is taken as to the purpose of the affidavit verifying a petition, be it in a bankruptcy or winding up case, the general principle governing an affidavit is that it must be made in some cause or matter which is actually pending in the court. It cannot serve the purpose of verifying to
> D something which is non-existent at the time it was sworn. More so, in a winding up case, where the legislature deem it fit to prescribe time frames for doing certain things, ie not only as to verification of a petition already presented but also to be filed within a certain prescribed period. If a formal application is to be made for extension of time for filing a subsequent affidavit to verify the petition, it ought to be made under r 7(1) which states as follows:
>
> E > 'Every application in court, other than a petition, shall be made by motion and shall be served on the party effected thereby not less than two days before the day named in the notice for hearing of the motion. An application for leave to serve short notice of motion shall be made ex parte.'
>
> It is, therefore, not sufficient merely to say so in the submission, as in this
> F case, that the court should apply its discretion to extend time pursuant to r 193. In any event, what is there to extend? It is not the case where the court is asked to extend the four days' period given by r 26, but it is more of a case of swearing an affidavit well before the petition is born. I would not exercise my discretion to allow the petitioners to reswear a second affidavit to verify as this would amount to condoning the flouting of r 26 to the prejudice of
> G the respondent company and the situation here is not one of those as given in the two English cases cited in *Chin Yoon*'s case. In the circumstances, I hold that the petition presented in this case is bad for the absence of an affidavit verifying the same in accordance with r 26 of the Rules and that the notice of demand issued upon the respondent company under sub-s 2(a) of s 218 of the Act does not help the petitioners to ask the court to presume
> H that the respondent company is unable to pay its debts. The petition of the petitioners is accordingly struck off and I make no order as to costs.

In the circumstances, the respondents prayed that their preliminary objection ought to be upheld and that I ought to strike out the s 181 petition forthwith.

I In reply Cik Gurmeet Kaur for the petitioner contended that s 181 of the Act provided a remedy in cases of oppression and the procedure, she conceded, in filing the petition, was pursuant to O 88 of the Rules of the High Court 1980 ('the RHC 1980').

However, she pointed out that neither O 88 nor O 9 of the RHC 1980 provided a form or format for a petitioner to adopt. She then relied on *Perusahaan Petanda Bintang Sdn Bhd v Asbir, Hira Singh & Co* [1995] 3 CLJ 234 wherein it was held that there was no requirement either in *Atkin's Court Forms* or in O 9 of the RHC 1980 that the petition must be supported by an affidavit except where there are special provisions relating to petitions of that particular class under any written law. It was thus argued that there was no need to even file an affidavit and I was urged to therefore ignore the affidavit filed.

However should an affidavit be required, the respondents relied on *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201 wherein the winding-up petition was presented on 15 February 1987 but the affidavit verifying the petition was affirmed on 10 February 1987, that is about four days before the presentation of the petition itself, 'which is a clear failure to comply with r 26 of the 1972 Rules', according to Lim Beng Choon J. However, his Lordship at pp 202 and 203 held as follows:

> ... From these three authorities I am therefore of the view that besides the discretionary power given to this court under the said rr 193 and 194, the Act itself under the provisions of s 221(2) ... allows this court to cure what I may say which is merely a technical error which does no injustice to the respondents. In view of the above I will allow an extension of time to the petitioner to reswear an affidavit to verify the facts and the filing and serving of such affidavit before the hearing of this petition.

The petitioner also relied on *Sam Hin Timber Co v Perusahaan Loan Sri Duyong Sdn Bhd* [1983] 2 CLJ 269. A petition to wind-up a company was presented on 24 March 1983 but the affidavit verifying the petition was affirmed on 8 March 1983. Peh Swee Chin J (as his Lordship then was) did not strike out the petition but allowed an extension of time to the petitioner to re-swear an affidavit to verify the facts. Abdul Kadir Sulaiman J in *Lim Tok Chiow & Anor v Dian Tong Credit & Development Sdn Bhd* [1994] 2 MLJ 345 declined to follow *Sam Hin Timber Co v Perusahaan Loan Sri Duyong Sdn Bhd* but instead followed *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173. In that case a petition to wind-up was presented on 17 May 1977, but the affidavit verifying the petition was sworn on 4 May 1977. Even though the petitioner took the opportunity during the adjournment granted for research to file another affidavit verifying the petition, Syed Othman J struck out the petition. The learned judge held that one could not verify an unsworn petition and thus the petition was struck out. With respect I am inclined to follow the decisions of Lim Beng Choon J in *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201 and Peh Swee Chin J (as his Lordship then was) in *Sam Hin Timber Co v Perusahaan Loan Sri Duyong Sdn Bhd* and to allow the petitioner time to re-affirm, re-file and re-serve the affidavit if such an affidavit was required. It is my view that non-compliance with r 26 does not render the petition a nullity. However, since this petition is a s 181 petition, I hold that there was no necessity in the first place to file an affidavit to verify a s 181 petition.

*Non-compliance with O 88 r 5(h) of the RHC 1980*

A The respondents referred to the intitulement of the s 181 petition which I reproduce hereunder:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
NO PETISYEN: D4–26–29–1995

B

Dalam Perkara EIC Clothing Sdn Bhd
Dan
Dalam Perkara s 181 Akta Syarikat 1965
C Dan
Dalam Perkara A 88 Kaedah-Kaedah Mahkamah Tinggi 1980

ANTARA

The Lyn Country Sdn Bhd
(dahulunya dikenali sebagai
D Crystal Sea Sdn Bhd) ... Pempetisyen

DAN

1 EIC Clothing Sdn Bhd ... Responden-Responden
2 Metro Multiples Sdn Bhd

E Encik Ismail's argument is that although the petitioner's intitulement was that of a s 181 petition but the form of the petition shows that it is a normal winding-up petition. Since the petition is a s 181 petition it has to comply with O 88 r 5(h) of the RHC 1980 which reads:

> 5 The following applications under the Act must be made by petition, namely, applications:
F ...
> (h) under s 181 of the Act for relief in cases of oppression;

It is also proper at this stage to refer to O 88 r 2(1) of the RHC 1980 which reads:

G > 2 (1) Unless otherwise provided in the Act, and except in the case of the applications mentioned in rr 3, 4 and 5, every application under the Act must, in accordance with O 5 r 3 be made by originating summons.

In the circumstances, En Ismail argued that the petition ought to strictly H comply with O 88 r 5(h) read together with O 88 r 2(1) and that it ought to have been filed by way of an originating summons and not as a normal winding-up petition.

Further it was argued that under this rule there was no need for an affidavit verifying the petition as such and that the petitioner ought to have taken out a summons for directions pursuant to O 88 r 7(1). However a I normal winding-up petition under the Act would require an affidavit verifying the petition. Further, pursuant to O 88 during the summons for directions stage the court would give a date for the hearing of the petition

unlike a normal winding-up petition where the registrar will fix the date for hearing of the petition, when the petition is presented.

In reply, the petitioner argued that there is no time frame provided under O 88 r 7 of the RHC 1980 as to when the summons for directions is to be issued. Notwithstanding the fact that the court had, pursuant to the indorsement, given 9 January 1996 as the date for the hearing of the petition, the petitioner argued that it had up to 9 January 1996 to file the summons for directions. As such this objection which was being heard only on 14 November 1995, had been made prematurely.

To answer the respondents' submission that the indorsement of the petition itself and the form of the petition indicated that the petitioner had elected for the s 181 petition to be one to which the winding-up rules would apply, the petitioner clarified that since there was no specific form provided by the RHC 1980, merely adopting the same format as that in the 1972 Rules and including an indorsement at the end of the petition did not render the s 181 petition void and warrant it being struck out.

The petitioner further contended that its petition is not a petition to wind-up the respondents per se. The petitioner argued that an originating petition such as the one filed by it was pursuant to O 9 of the RHC 1980. It relied on *Re Lee Mah Realty Sdn Bhd; Song Kuen Poh v Liew Chock Sang & Ors* [1980] 1 MLJ 115 wherein the court held that the correct procedure to commence an application under s 181 was by originating petition and accordingly the proceedings were correctly commenced and not by way of originating motion as submitted by the respondents.

Neither, it was argued, did it mean that by the adoption of the format in the 1972 Rules, the petitioner was therefore proceeding under the 1972 Rules when it was clear from the intitulement that it was a s 181 petition and that the prayers sought were clearly those provided by s 181 of the Act. In any event Cik Gurmeet Kaur for the petitioner contended that the 1972 Rules do not apply to petitions filed under s 181 of the Act.

Encik Ismail conceded that in the case of a s 181 petition the 1972 Rules would not apply. He submitted that the 1972 Rules were made pursuant to s 372(d) of the Act which reads:

> 372 Rules.
>
> The Rules Committee constituted under the Courts of Judicature Act 1964 may, subject to and in accordance with the provisions of that Act relating to the making of rules, make rules:
>
> ...
>
> (d) generally with respect to the winding-up of companies.

He also referred to O 1 r 1 of the RHC 1980 which reads:

> 1 These rules may be cited as the Rules of the High Court 1980, and shall come into force on 1 June 1980.

He thus submitted that s 372(d) of the Act read together with O 1 r 1 of the RHC 1980 had the combined effect of ensuring that each applied separately. In the circumstances, he submitted, there was no way that the

petitioners could effectively use the form of petition and file an affidavit verifying the petition as required under r 26 of the 1972 Rules for a s 181 petition which is governed by the RHC 1980.

Upon consideration of the submissions set out above, I dismissed the preliminary objections. It is abundantly clear that the 1972 Rules have no place in a s 181 petition and that a petition under s 181 ought to be governed by O 88 of the RHC 1980, and that the use of the form of the petition in the 1972 Rules does not invalidate the s 181 petition, neither does it mean that by its use, the petitioner had elected to be governed by the 1972 Rules and turn the s 181 petition into a winding-up petition.

Having disposed of the preliminary objections, parties by consent, agreed to provide written submissions to both the motion and the application to strike out both the petitions. However before the motion or the application could be heard, the petitioner raised a preliminary objection to the motion to strike out the s 218 petition. The motion to strike out was two pronged:

(a) under the various heads of O 18 r 19 of the RHC 1980; and

(b) under the inherent jurisdiction of this court to prevent an abuse of the process of the court.

PETITIONER'S PRELIMINARY OBJECTION

The preliminary objection was that this court had no jurisdiction to grant the reliefs prayed for in the motion, as the reliefs were prayed for pursuant to the RHC 1980.

*Whether the RHC 1980 applies to a s 218 petition?*

It was submitted that the RHC 1980 does not apply to s 218 petitions and as such the reliefs prayed for pursuant to O 18 r 19 were misconceived. The petitioner relied on O 1 r 2(2) of the RHC 1980 which reads:

(2) These rules shall not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

(3) In the case of the proceedings for which rules have been made, nothing in para (2) shall be taken as affecting any provision of any rules (whether made under the Act or any other written law) by virtue of which the RHC 1980 or any provisions thereof are applied in relation to any of those proceedings.

Section 372 of the Act was also relied on and it reads:

372 *Rules.*

The Rules Committee constituted under the Courts of Judicature Act 1964, may, subject to and in accordance with the provisions of that Act relating to the making of rules, make rules:

(a) with respect to proceedings and the practice and procedure of the court under this Act;

(b) with respect to any matter or thing which is by this Act required or permitted to be prescribed by rules; A

(c) without limiting the generality of the provisions of this section, with respect to court fees and costs and with respect to rules as to meetings ordered by the court; and

(d) generally with respect to the winding-up of companies. B

It was thus argued that s 372 of the Act conferred the necessary statutory authority upon the Rules Committee (under s 17 of the Courts of Judicature Act 1964) to make rules 'generally with respect to the winding up of companies'. Hence by reading the above legislative provisions together, the petitioner contended that the RHC 1980 does not apply as the 1972 Rules would be those specific rules that had been made pursuant to s 372 (d) of the Act. C

The petitioner relied on *Re Lo Siong Fong* [1994] 2 MLJ 72 wherein VC George J (as he then was) observed per curiam, that O 18 r 19 of the RHC 1980 had no application to a s 218 petition. In response to that, the respondent pointed out that his Lordship was never referred to his own earlier decision in *NKM Development Sdn Bhd v Irex Sdn Bhd* [1988] 1 CLJ 65 where an application was made to strike out a s 218 petition under O 18 r 19(2) and his Lordship did strike it out under that order. D

In reply, counsel for respondents whilst conceding that the 1972 Rules being in the nature of specialized rules has no application towards the general provisions of the RHC 1980, argued that it is one of the canons of interpretation that the general rules and law would also apply to special situations unless there are express provisions to the contrary. In other words he sought to invoke the maxim *generale tantum valet in generalibus quantum singulare in singulis* and not vice versa. The respondents further argued that the 1972 Rules are not exhaustive nor are they intended to be so. Counsel cited some examples, that is, whilst the 1972 Rules speak of affidavits, they do not, however, provide sufficient details or the form and manner of affidavits required as provided for under O 41 of the RHC 1980. Neither do the 1972 rules provide the form or the manner of drawing up orders as provided for under O 42 of the RHC 1980. To illustrate this point, counsel relied on a passage from *Dato' Mohamed Hashim Shamsuddin v A-G of Hong Kong* [1986] 2 MLJ 112 SC wherein Abdoolcader SCJ in relating O 1 r 2(2) to criminal proceedings and having heard arguments on O 1 r 2(3) said at p 122: E F G

> ... I think this contention is a fallacy as the reference to 'any rules' before the parenthesis in that paragraph must *ex necessitate rei* include the RHC 1980 themselves as well, since any other construction would emasculate and indeed negate the validity of vital portions of the RHC 1980 as, for example, O 52 which provides for committal for contempt and specifically relates and refers to criminal proceedings and O 54 in relation to applications for the writ of habeas corpus. When I put this to Mr Sethu he was hard put to give any effective answer. I would emphasize that O 1 r 2(3) in specifically providing an exception to the provisions of para (2) of that rule categorically permits the application of RHC 1980 *or any provisions* H I

A *thereof* in relation to the proceedings specified in para (2) of r 2. (Emphasis added).

Having read the legal provisions set out above carefully, I find that O 1 r 2(3) of the RHC 1980 clarifies that where insofar as there exists separate procedural rules, r 2(2) of the RHC 1980 will not have the effect of B excluding the application of the RHC 1980 where there exists a provision in the other procedural rules allowing for the application of the RHC 1980.

The wisdom of the Rules Committee in specifically excluding a provision of the old r 210 of the Companies (Winding-up) Rules 1946 C must be given due consideration. The said rule reads as follows:

> 210 In all proceedings in or before the court, or any registrar or officer thereof, or over which the court has jurisdiction under the Ordinance and Rules, where no other provision is made by the Ordinance or Rules, the practice, procedure and regulations shall, unless the court otherwise in any special case directs, be in accordance with D the Rules and practice of the court.

The intent and purpose of excluding such a provision from the 1972 Rules must in my view be for the specific purpose of bringing into question O 1 r 2(3) of the RHC 1980 and I therefore hold that the RHC 1980 has no application to winding-up petitions. Therefore, I am not prepared to read E O 1 r 2(3) in isolation with r 2(2) since O 1 r 2(3) makes an express reference to r 2(2).

In *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 SC Gunn Chit Tuan SCJ held at p 295 that 'in such a case the RHC 1980 do not apply. The 1972 Rules apply ...'.

F The case his Lordship referred to was a petition which 'was in fact assigned a distinctive number by the Registrar of the Court, ie Companies Winding Up No 6 of 1985 ...' filed pursuant to s 218 of the Act. I am bound by this decision and therefore hold that the RHC 1980 does not apply to a s 218 petition. Further, a petition brought pursuant to s 218 is G specifically known as a 'winding-up petition' by virtue of r 8 of the 1972 Rules. The respondents' attempt to argue that the 1972 Rules are not exhaustive, is not correct. The said rules do provide the format for applications which the said rules specifically provide for. For example, Form 1 relates to summons brought pursuant to r 7, Form 2 relates to the proper format for a petition, Form 7 dictates the format for an affidavit H verifying the petition. Rule 12 (Form 11) also relates to the drawing up of orders made and rr 17 and 18 relate to the source and r 20 to enforcement of orders which expressly allows for the operation of the court's ordinary jurisdiction.

The case of *Dato' Mohamed Hashim Shamsuddin v A-G of Hong Kong* I [1986] 2 MLJ 112 referred to by the respondents related to an application made by the A-G of Hong Kong pursuant to O 66 r 1 of the RHC 1980 to allow for deposition to be taken in Malaysia for use in Hong Kong in a criminal matter. The respondents' reliance on the passage from Abdoolcader

SCJ's judgment must be considered based on the factual matrix of that case, that is in relation to criminal proceedings. Abdoolcader SCJ held that the words 'any rules' in O 1 r 2(3) should include the RHC 1980 itself and as such where a rule of the RHC 1980 makes a specific provision, its application to certain type of proceedings which may be excluded by O 1 r 2(2) will apply to the said proceedings despite there being in existence a separate set of rules for the same. By way of example he cited O 52 of the RHC 1980 as having specific reference to criminal proceedings, that is O 52 r 1(2)(a)(ii). He also referred to O 54 of the RHC 1980 which has since been repealed.

The respondents' submission that since O 18 r 19(3) makes reference to 'petitions' the said rule is applicable to 'winding-up petitions' is misconceived in view of r 8 of the 1972 Rules (which clearly came into effect before the RHC 1980) which expressly states that petitions brought pursuant to the 1972 Rules shall be intituled as 'companies (winding-up)' petitions. Since no reference within O 18 r 19(3) of the RHC 1980 is made to 'winding-up' petitions, I rule that O 18 has no application to a s 218 petition and that the case of *Dato' Mohamed Hashim Shamsuddin v A-G of Hong Kong* [1986] 2 MLJ 112 does not lend any assistance to the respondents' cause.

Finally the respondents referred me to rr 163, 164 and 165 of the 1972 Rules which read as follows:

> 163 Where an order has been made for the winding-up of a company the judge shall have power without further consent to order the transfer to him of any action cause or matter pending brought or continued by or against the company.
>
> 164 Where any action brought by or against a company against which a winding-up order has been made is so transferred the court may determine and deal with any application matter or proceeding which, if the action had not been transferred, would have been determined in chambers.
>
> 165 Every solicitor, manager, accountant, auctioneer, broker or other person employed by a liquidator in a winding-up by the court shall on request by the liquidator in Form 84, to be made a sufficient time before the declaration of a dividend, deliver his bill of costs or charges to the taxing officer for the purpose of taxation; and if he fails to do so within the time stated in the request or such extended time as the registrar may allow, the liquidator shall declare and distribute the dividend without regard to such person's claim.

It was submitted that since reference was made to 'any action cause or matter pending brought or continued by or against the company', therefore the normal procedure under the RHC 1980 would apply. In support of this argument the respondents relied on *Watta Battery Industries Sdn Bhd v Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners)* [1993] 1 MLJ 149 where Selventhiranathan JC (as he then was) held at p 161:

A Towards avoiding such 'outside or expensive litigation in other courts', r 163 provides for the transfer to the winding-up court of any action, cause or matter pending, brought or continued by or against the company.

The learned judge refused leave to proceed with the civil suit since he held that the petitioner could obtain the relief it sought in the civil suit in the B winding-up proceedings as it had chosen to do so by submitting its proof of debt to the liquidators.

It is apparent that rr 163 and 164 allow for the transfer of an action to the court hearing the winding-up petition but thereafter the action should proceed according to the law and procedure pursuant to which the said action was initially brought. This much should be quite apparent as it C is inconceivable that the 1972 Rules should apply to an action in tort. Similarly, I am of the view that the respondents' reliance on r 195 should meet with a similar fate because the Rules Committee specifically disallowed the application of items 125–190 of the Third Schedule to the Rules of the Supreme Court 1957 which was related to the Companies Ordinance and D brought it within the Second Schedule of the 1972 Rules which provided for its own scale of fees. It is thus even more apparent to me that the Rules Committee had specifically intended to exclude all provisions of the RHC 1980 to winding-up petitions. I therefore allowed the petitioner's preliminary objection on the first ground.

E *Can this court strike out a s 218 petition pursuant to its inherent jurisdiction to prevent abuse of the process of the court?*

In the event that I may be wrong in allowing the first objection put forward by the petitioner I considered the second issue on inherent jurisdiction, as well.

F The petitioner referred me to art 121 of the Federal Constitution as a basis for its attack that the court has no inherent jurisdiction to strike out a s 218 petition.

Article 121 reads:

121(1) There shall be two High Courts of co-ordinate jurisdiction and G status, namely:

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak which shall be known as the High Court in Sabah and Sarawak and shall have its H principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed);

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be I conferred by or under federal law.

It was submitted that there is no provision in the Federal Constitution which allows for the application or preservation of the common law 'inherent jurisdiction' of the High Court.

It was the petitioner's contention that the High Court does not have 'inherent jurisdiction' and that it is up to the legislature to allow for the operation/preservation of the common law 'inherent jurisdiction' by way of 'federal law'. The petitioner relied on *Zainal Abidin bin Haji Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 40 where the court held that although the jurisdiction of the High Court is unlimited in the sense that it is as wide a jurisdiction as that of the High Court in England, the expression 'unlimited jurisdiction' only describes the extent or area where the judicial authority or power of the High Court is exercisable. The manner in which the judicial authority or power is exercised is not unlimited, as the High Court is a creature of statute and all its powers must be derived from a written law, expressly or by necessary implication. It was further submitted that the only relevant 'federal law' with respect to the winding-up of companies is the Companies Act 1965 which makes reference to ss 10 and 17 of the Courts of Judicature Act 1964 and the only applicable rules of procedure for court proceedings commenced under s 218 of the Act are the 1972 Rules and it was argued that there is no specific provision in the Act or the 1972 Rules which allow for the operation of 'inherent jurisdiction' or the preservation of the same.

In reply, the respondents relied on the schedule to s 25(2) of the Courts of Judicature Act 1964 para 11 which reads:

> 11 Power to dismiss or stay proceedings where the matter in question is res judicata between the parties or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

It was submitted that the word 'dismiss' referred to in para 11 could not conceivably mean dismissal after a hearing on the merits as it would be self-defeating. It therefore could only mean a summary dismissal.

I had considered carefully the arguments of the petitioner that this court has no inherent jurisdiction to hear a striking out of a s 218 petition. I considered the effect of O 92 r 4 of the RHC 1980 wherein the Rules Committee expressly reserved the application of the 'inherent jurisdiction' of the High Court with respect to all proceedings initiated pursuant to the RHC 1980. I also considered the effect of *Re Display Multiples Ltd* [1967] 1 WLR 571 which concerned the application of r 227 of the English Companies (Winding-Up) Rules 1949 which reads as follows:

> 227 *Application of existing procedure*
>
> In all proceedings in or before the court, or any judge, registrar or officer thereof, or over which the court has jurisdiction under the Act and Rules, where no other provision is made by the Act or Rules, the practice procedure and regulations shall unless the court otherwise in any special case directs, in the High Court be in accordance with the Rules of the Supreme Court and practice of the High Court, and in a Palatine Court and the county court in accordance, as far as practicable, with the existing Rules and practice

A of the court in proceedings for the administration of assets by the court.

It would have been possible in England in 1949 pursuant to r 227 to file an application pursuant to O 18 r 19 to strike out a winding-up petition. There is a significant absence of an equivalent of this rule in the 1972 B Rules. I had to consider whether by refusing to incorporate a rule similar to the English r 227 or a rule similar to our O 92 r 4 of the RHC 1980 in the 1972 Rules, the Rules Committee consciously did not wish to provide for an application of inherent jurisdiction with respect to petitions initiated pursuant to s 218 of the Act.

C In the light of my earlier finding that the RHC 1980 has no place in a s 218 petition, I find myself unable to rely on O 92 r 4 of the RHC 1980 to hold that I have the inherent jurisdiction to strike out a s 218 petition. I therefore have to fall back on the Federal law, that is the Act to see if I have the said inherent jurisdiction. I am of the view that s 221(2)(f) of the Act clearly gives me the right to invoke an inherent jurisdiction to strike D out a s 218 petition. For clarity I reproduce herewith the said section:

> 221 *Powers of court on hearing petition*:
>
> ...
>
> (2) The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company or any person E who has given notice that he intends to appear on the hearing of the petition:
>
> (a) direct that any notices be given or any steps taken before or after the hearing of the petition;
>
> (b) dispense with any notices being given or steps being taken which F are required by this Act, or by the rules, or by any prior order of the court;
>
> (c) direct that oral evidence be taken on the petition or any matter relating thereto;
>
> (d) direct a speedy hearing or trial of the petition or any issue or matter;
>
> G (e) allow the petition to be amended or withdrawn; and
>
> (f) give such directions as to the proceedings as the court thinks fit.

If this court finds sufficient grounds which warrant the striking out of a s 218 petition, I am of the view that pursuant to s 221(2)(f) I can give directions H to a respondent to apply to strike out the said petition and that if there is already such an application before me, that I do hear it.

Having found that I do have inherent jurisdiction to hear an application to strike out a s 218 petition, though not on the basis submitted by the respondent, I still dismissed the said motion to strike out after having considered both counsel's submission on this which I shall deal with now.

I

THE MOTION TO STRIKE OUT THE S 218 PETITION (D5–28–290–95)

The thrust of this application was that the issues addressed through the s 218 petition are already before other divisions of the High Court and thus ought to be struck out for multiplicity.

It was submitted on behalf of the respondents that the petitioner, in attempting to show the background to the formation of the first respondent contended that the whole matter arose from the offer letter dated 7 March 1991 referred to under 'Background Facts Of The Dramatis Personnae'. The petitioner states that the said offer letter was given effect through a purported joint-venture agreement also referred to earlier. The gravamen of the petitioner's complaints is that the respondents are not honouring the said purported joint venture agreement.

THE MULTIPLICITY OF ACTIONS

The respondents submit that the offer letter dated 7 March 1991 is before the Kuala Lumpur High Court by way of an originating summons D4–24–139–94 commenced by PL as plaintiff with the second respondent in this petition being the fourth defendant in the said D4 action. It was contended that extensive submissions have been made in relation to the meaning and effect of the said letter of offer in the D4 action. However it was submitted that the learned judge hearing the D4 action had dismissed the present respondents' application and 'has decided that it wants to hear the entire case on its merits'. It was further submitted that the respondents are appealing against that decision. I presume that the application referred to by the respondents in their submission must be an application to strike out the originating summons in the said D4 action. The alternative application of the respondents in the D4 action to convert the originating summons to a writ action was also dismissed by my learned brother Abu Samah Nordin JC (as he then was). It was therefore submitted before me that two different High Courts ought not to adjudicate a similar issue.

It was also submitted by the respondents that PL had also commenced another action in the Kuala Lumpur Sessions Court, that is summons No: 52–511–95 and the defendant therein is the first respondent in this petition. This action was to recover monies owing to her from the defendants under an employment agreement which arose as a part of the joint-venture agreement. This action has not been proceeded with due to the earlier mentioned originating summons.

In the midst of filing affidavits to stay the above mentioned sessions court action, the first respondent received a statutory demand from PL pursuant to s 218(2) of the Act which actually incorporated the statement of claim filed in the above-mentioned sessions court. Faced with the possibility of being wound up due to the statutory presumption of insolvency, the first respondent obtained an interim injunction through another suit D2–22–297–95, inter alia, prohibiting PL from presenting a winding-up petition. The first respondent also asked for a declaration that the joint venture agreement dated 21 December 1992 be declared null and void. It was argued that the joint venture agreement (by virtue of cl 5.5 thereof) made it mandatory on the parties to execute the employment

A agreement. PL's application to strike out the entire suit D2–22–297–95 was heard but no decision has been given. In the meantime MJB and the first respondent herein had by way of another civil suit D1–22–471–95 sued PL and another company for the tort of passing off. And in respect of this action a counter claim was presented by the defendants which cites and relies upon the offer letter and the joint-venture agreement.

B

In addition to the above suits there are these two present petitions making a total of five matters. It was thus submitted that the multiplicity of actions was tantamount to an abuse of the process. The respondents relied on *Thames Lauches Ltd v Trinity House Corp (Deptford Strond)* [1961] 1 Ch 197 at p 207 where the court held that if two courts are faced C substantially with the same question, it is desirable to ensure that that question is debated in only one of those two courts if by that means justice can be done. This same principle was upheld by the then Supreme Court in *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184. It was the contention of the respondents that PL or her D nominee, that is the petitioner, merely wanted to disable the first respondent from aggressively pursuing the other action earlier referred to. Finally on this motion the respondents queried the propriety of the petitioner's motive in filing two petitions. If the petitioner was already seeking winding-up as an alternative remedy in the s 181 petition, that is the D4–26–29–95 petition then why it was asked, was there a need to present and to advertise E another s 218 petition if not to do damage to the first respondent who it was alleged was PL's business rival. I was then asked to strike out this s 218 petition.

In reply the petitioner submits that the main issue before me relates to the rights of the first respondent and that this issue has never been F before any other court and if the application to strike out is granted it would be tantamount to shutting out the only forum available to the petitioner to ventilate its grievances relating to the manner in which it is alleged, the first respondent is being managed by the representatives of the second respondent. In respect of the offer letter dated 7 March 1991 the petitioner referred me to para 8 of encl 16 of the s 181 petition wherein it G had stated the reason for the introduction of the said letter of offer into the D4 suit (D4–24–131–94). The ownership of the East India Company trade mark was to rest in a joint venture company wherein the petitioner and MJB would have equal shares. There is such a company in existence called Danberg Overseas Incorporated. The D4 suit merely seeks H declarations that MJB holds the mark in trust for this joint venture company and with this in mind was the establishment of the first respondent to market the East India Company branded goods. In the circumstances, it was submitted that there was no similar issue to cause a multiplicity. Since there was no denial that the petitioner was a 30% shareholder of the first respondent, the petitioner's submission was that it does not need the said I offer letter to establish its rights as a shareholder of the first respondent. The joint venture agreement signed by both parties was more relevant to these proceedings. It was the submission of the petitioner that this court was not being asked to construe the terms of the said letter of offer.

In respect of the joint venture agreement the petitioner submits that the issue of the validity of the said joint venture agreement is in actual fact not before any court as yet. The joint venture agreement is relied upon as evidence only in support of the terms of the letter of offer dated 7 March 1991. In fact the respondents had stated in their affidavit that both the second respondent and MJB 'are awaiting the outcome of the appeal on the application to strike out *before applying* to include claims for declarations relating to the "letter of intent" and the "joint venture agreement" in D4–24–139–94'. (Emphasis added.)

In para 6 of encl 7 the respondents state:

> When appropriate, Metrojaya Bhd and Metro Multiples Sdn Bhd (the second respondent) would raise the issue of the validity of the 'joint venture agreement' *aside from merely making averments in affidavit form or by submissions*. (Emphasis added.)

And in their written submission the respondents state:

> In which event our clients *would ineluctably (sic) have to file* a counterclaim challenging, inter alia, the validity of the 7 March 1991 letter and the 'joint venture agreement'. (Emphasis added.)

It was argued that the respondents could have in 1994 itself issued an originating summons or writ seeking a declaration with respect to the validity of the joint venture agreement.

In respect of the employment agreement and the sessions court action No 52–511–95 the petitioner submits that it concerns the employment of PL by the first respondent and relates to a claim for monies owned to the said PL by the first respondent. The petitioner herein have nothing to do with the claims for salaries and/or remuneration owed.

In respect of the statutory demand issued by PL, the same was based on the amount due to PL by the first respondent concerning her employment and in any event further action on the part of PL was pre-empted by the respondents' injunction obtained through suit No D2–22–297–95. In the said suit the first respondent sought declarations that both the employment agreement and the joint venture agreement be declared null and void. The petitioner submitted that it was incomprehensible how a statutory demand based on merits owing under an employment agreement could have justified a claim by the first respondent for a declaration pertaining to an entirely separate agreement, that is the joint venture agreement. It was on this basis that the petitioner filed an application to strike out the suit and which is pending decision.

In respect of the suit D1–22–471–95 the issue was who actually owns the East India Company trade mark as only the owner of the mark and the authorized licensee of the mark would be justified in maintaining an action for passing off. Since the earlier reference to the D4 suit clearly relates to the issue of ownership of the East India Company mark it was therefore submitted, as an inevitable sequence for PL and the other company jointly sued, to raise the issue of ownership and licensing of the East India Company mark in their defence and counter claim.

In response to the allegation of ulterior motives and the resultant abuse of process, the petitioner states that its advertisement of the petition was in conformity with the requirement of the 1972 Rules. As to why two petitioners were filed, the petitioner explained that the purpose was to present to this court all the material facts and then to allow one to decide which course of action would be most appropriate in this particular instance.

I find that had the respondents intended that the two agreements, namely the employment and the joint venture agreement were interlinked and dependent on one another, then there would be no purpose for the respondents to have filed separate prayers for declaration that each of the two agreements is null and void. In my view, it would have been more logical and legally tenable for the first respondent to have first sought a declaration that the employment agreement was part of the joint venture agreement and then to ask for a further declaration to the effect that the joint venture agreement was null and void. In fact if at all there is any duplicity of action it is the conduct of the first respondent and MJB in filing the D1 (passing off) action, regarding the ownership of the East India Company mark when the same was already before the court in the D4 action.

I find that the respondents' allegation of multiplicity of proceedings are factually not made out for the following reasons. Firstly, the D4 action concerns the issue of ownership of the East India Company trade mark which is not an issue in the two petitions before the court and in any event the issue does not concern the first respondent in any way. Secondly, the D2 matter essentially arises out of a statutory demand made by PL against the first respondent for salaries owed to her and therefore concerns the employment agreement which is an independent and separate agreement from the joint venture agreement. In any event the petitioner and the second respondent are not named as parties therein. Thirdly the D1 matter concerns the passing off of the East India Company mark and touches upon the issue, inter alia, of ownership of these marks, which is before the D4 court. In the circumstances, I hold that this application to strike out is devoid of merit and hence is dismissed with costs.

THE SUMMON IN CHAMBERS TO STRIKE OUT THE S 181 PETITION (D4–26–29–95)

It was the contention of the respondents that presenting any petition with an improper or ulterior purpose was an abuse of the process of the court. It was argued that the D4 petition was presented two days after the D5 petition was presented and that the facts relied upon were the same as stated in the D5 petition. Hence the respondents relied on the Supreme Court decision of *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 and submitted that a petitioner who seeks a winding-up of a company under s 181 and that too as an alternative remedy cannot and ought not to present a s 218 winding-up petition or vice versa. It was suggested that the petitioner merely wanted a back-up petition, just in case the first one (the D5 petition) was unsuccessful. It was asked if by presenting two distinct

petitions the petitioner was hoping the first respondent was to be slain twice.

In response the petitioner argued that it had every right to present two petitions and that in the light of the Supreme Court decision in *Lai Kim Loi v Dato Lai Fook Kim & Anor* it was constrained to file two petitions. It may well be that I might find that the petitioner had failed to make out a case of oppression in the s 181 petition but that I could proceed to hold that if the second respondent had failed to honour the terms of the joint venture agreement, then the substratum of the joint venture agreement was at an end and thus consequently it would be just and equitable to wind-up the first respondent under s 218(1)(i) of the Act.

I find that in *Lai Kim Loi v Dato Lai Fook Kim & Anor*, the petitioner therein had proceeded to 'roll a s 181 and a s 218 petition' in one petition but preferred to intitule it as a winding up petition. The Supreme Court held that the petition was defective as different sets of rules applied to sections 181 and 218 petitions respectively. The Supreme Court did not at any point of time expressly state that a petitioner had no right to present two separate petitions under ss 181 and 218 of the Act respectively. It is my view that a petition pursuant to s 218(1)(i) is justified in a quasi-partnership type scenario and as such would not be applicable to just any type of company sought to be wound up (see *Ebrahimi v Westbourne Galleries Ltd* [1973] 3 AC 360 HC). I find that s 218(1)(i) is clearly applicable to the present scenario in that there is in existence a 'quasi-partnership' type situation wherein there are only two parties involved, that is the petitioner and the second respondent, both of whom agreed to form the first respondent. On the authority of *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 I am of the view that the petitioner has every right to present the petitions separately under ss 181 and 218 of the Act respectively and that the respondents have failed to establish a clear cut case to warrant a striking off of those petitions.

It is only in plain and obvious cases that recourse should be had to the summary process of striking off. There is no way that the respondents' case satisfy me that both the petitions are unsustainable. I will not allow the respondents to deny the petitioner its right to ventilate its grievances before me. The law journals are replete with authorities in the above proposition which is trite law. In the circumstances, I dismissed both the motion to strike out the s 218 petition and the summons in chambers to strike out the s 181 petition with costs.

*Applications dismissed.*

Reported by Lew Chee Seong